UNITED STATES INTERNATIONAL TRADE COMMISSION

BULK ACETYLSALICYLIC ACID (ASPIRIN) FROM CHINA
Investigation No. 731-TA-828 (Preliminary)

DETERMINATION AND VIEWS OF THE COMMISSION
(USITC Publication No. 3211, JULY 1999)

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DETERMINATION

On the basis of the record[1] developed in the subject investigation, the United States International Trade Commission determines, pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. § 1673b(a)), that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports from China of bulk acetylsalicylic acid (aspirin), provided for in subheadings 2918.22.10 and 3003.90.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value (LTFV).[2]

COMMENCEMENT OF FINAL PHASE INVESTIGATION

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigation. The Commission will issue a final phase notice of scheduling which will be published in the *Federal Register* as provided in section 207.21 of the Commission's rules upon notice from the Department of Commerce (Commerce) of an affirmative preliminary determination in the investigation under section 733(b) of the Act, or, if the preliminary determination is negative, upon notice of an affirmative final determination in that investigation under section 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigation need not enter a separate appearance for the final phase of the investigation. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigation.

BACKGROUND

On May 28, 1999, a petition was filed with the Commission and the Department of Commerce by Rhodia, Inc., Cranbury, NJ, alleging that an industry in the United States is materially injured or threatened with material injury by reason of LTFV imports of bulk aspirin from China. Accordingly, effective May 28, 1999, the Commission instituted antidumping investigation No. 731-TA-828 (Preliminary).

Notice of the institution of the Commission's investigation and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S.International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of June 7, 1999 (64 FR 30355). The conference was held in Washington, DC, on June 18, 1999, and all persons who requested the opportunity were permitted to appear in person or by counsel.

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[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

[2] Commissioner Carol T. Crawford determines that there is a reasonable indication that an industry in the United States is materially injured by reason of the subject imports from China that are alleged to be sold in the United States at LTFV.

The Commission transmitted its determination in this investigation to the Secretary of Commerce on July 12, 1999. The views of the Commission are contained in USITC Publication 3211 (July 1999), entitled *Bulk Acetylsalicylic Acid (Aspirin) from China: Investigation No. 731-TA-828 (Preliminary)*.

By order of the Commission.

Donna R. Koehnke
Secretary

Issued:

VIEWS OF THE COMMISSION

Based on the record in these investigations, we find a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of bulk aspirin from China that are allegedly sold in the United States at less than fair value ("LTFV").[1]

I. THE LEGAL STANDARD FOR PRELIMINARY DETERMINATIONS

The legal standard for preliminary antidumping determinations requires the Commission to determine, based upon the information available at the time of the preliminary determination, whether there is a reasonable indication that a domestic industry is materially injured, threatened with material injury, or the establishment of an industry is materially retarded, by reason of the allegedly LTFV imports.[2] In applying this standard, the Commission weighs the evidence before it and determines whether "(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation."[3]

II. DOMESTIC LIKE PRODUCT AND INDUSTRY

A. In General

To determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of the subject merchandise, the Commission first defines the "domestic like product" and the "industry."[4] Section 771(4)(A) of the Tariff Act of 1930, as amended ("the Act"), defines the relevant domestic industry as the "producers as a [w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product."[5] In turn, the Act defines "domestic like product" as: "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation . . . ."[6]

The decision regarding the appropriate domestic like product(s) in an investigation is a factual determination, and the Commission has applied the statutory standard of "like" or "most similar in characteristics and uses" on a case-by-case basis.[7] No single factor is dispositive, and the Commission

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[1] Commissioner Crawford found that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of bulk aspirin from China that are allegedly sold in the United States at less than fair value. See Views of Commissioner Carol T. Crawford. She joins in sections I-III of these views.

[2] 19 U.S.C. § 1673b(a); see also American Lamb Co. v. United States, 785 F.2d 994, 1001-1004 (Fed. Cir. 1986); Aristech Chemical Corp. v. United States, 20 CIT __, Slip Op. 96-51 at 4-6 (March 11, 1996).

[3] American Lamb, 785 F.2d at 1001 (Fed. Cir. 1986); see also Texas Crushed Stone Co. v. United States, 35 F.3d 1535, 1543 (Fed. Cir. 1994).

[4] 19 U.S.C. § 1677(4)(A).

[5] 19 U.S.C. § 1677(4)(A).

[6] 19 U.S.C. § 1677(10).

[7] See, e.g., NEC Corp. v. Department of Commerce, Slip Op. 98-164 at 8 (Ct. Int'l Trade, Dec. 15, 1998); Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995); Torrington Co. v. United States, 747 F. Supp. 744, 749, n.3 (Ct. Int'l Trade 1990), aff'd, 938 F.2d 1278 (Fed. Cir. 1991) ("every like product determination 'must be made on the particular record at issue' and the 'unique facts of each case'"). The Commission generally considers a number of factors including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) common manufacturing facilities, production processes and production employees; and, where appropriate, (6) price. See Nippon, 19 CIT at 455,

(continued...)

may consider other factors it deems relevant based on the facts of a particular investigation.[8] The Commission looks for clear dividing lines among possible like products, and disregards minor variations.[9] Although the Commission must accept the determination of the Department of Commerce ("Commerce") as to the scope of the imported merchandise allegedly sold at LTFV, the Commission determines what domestic product is like the imported articles Commerce has identified.[10]

B. Product Description

In its notice of initiation, Commerce defined the imported merchandise within the scope of these investigations as:

> [B]ulk acetylsalicylic acid, commonly referred to as bulk aspirin, whether or not in pharmaceutical or compound form, not put up in dosage form (tablet, capsule, powders or similar form for direct human consumption). Bulk aspirin may be imported in two forms, as pure ortho-acetylsalicylic acid or as mixed ortho-acetylsalicylic acid. Pure ortho-acetylsalicylic acid can be either in crystal form or granulated into a fine powder (pharmaceutical form). This product has the chemical formula $C_9H_8O_4$. It is defined by the official monograph of the United States Pharmacopoeia (USP) 23. It is classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheading 2918.22.1000.
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> Mixed ortho-acetylsalicylic acid consists of ortho-acetylsalicylic acid combined with other inactive substances such as starch, lactose, cellulose, or coloring materials and/or other active substances. The presence of other active substances must be in concentrations less than that specified for particular nonprescription drug combinations of aspirin and active substances as published in the Handbook of Nonprescription Drugs, eighth edition, American Pharmaceutical Association. This product is classified under HTSUS subheading 3003.90.0000. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.[11]

Bulk acetylsalicylic acid, commonly known as bulk aspirin, is a white, odorless, organic compound with the chemical formula $C_9H_8O_4$.[12] It is used for medicinal purposes, primarily for mild pain relief, fever

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[7] (...continued)
n.4; Timken Co. v. United States, 913 F. Supp. 580, 584 (Ct. Int'l Trade 1996).

[8] See, e.g., S. Rep. No. 96-249, at 90-91 (1979).

[9] Nippon Steel, 19 CIT at 455; Torrington, 747 F. Supp. at 748-49. See also S. Rep. No. 96-249, at 90-91 (1979) (Congress has indicated that the like product standard should not be interpreted in "such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not 'like' each other, nor should the definition of 'like product' be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under consideration.").

[10] Hosiden Corp. v. Advanced Display Mfrs., 85 F.3d 1561, 1568 (Fed. Cir. 1996) (Commission may find single like product corresponding to several different classes or kinds defined by Commerce); Torrington, 747 F. Supp. at 748-752 (affirming Commission determination of six like products in investigations where Commerce found five classes or kinds).

[11] 64 Fed. Reg. 33463 (June 23, 1999).

[12] Confidential Staff Report ("C.R.") at I-2, Public Staff Report ("P.R.") at I-2.

relief, or as an anti-inflammatory agent.[13] Aspirin also is used in low dosages for the treatment of stress and cardiovascular disease.[14]

For the purposes of this investigation, bulk aspirin may be in pharmaceutical or compound form but not in measured doses, tablets, or capsules for direct human consumption.[15] It may be pure acetylsalicylic acid in crystal form or granulated into a fine powder. The acetylsalicylic acid also may be mixed with small amounts of inactive materials, such as starch, lactose, cellulose, or coloring agents.[16]

C. Domestic Like Product Issues

Petitioner asserts that the Commission should find a single domestic like product consisting of bulk aspirin.[17] Respondents[18] claim that defining the like product in this manner wrongfully would include their aspirin starch product.[19] As discussed below, we determine for the purpose of the preliminary phase of this investigation that there is one domestic like product consisting of all bulk aspirin.

The Commission's analysis of like product issues begins with the scope. The scope covers bulk aspirin in pharmaceutical and compound form, not put up in dosage form ready for human consumption. The scope therefore clearly includes all bulk aspirin crystals and aspirin starch. We have considered whether to find that domestically produced crystal aspirin and aspirin starch are two separate like products and have declined to do so. The Commission generally does not find separate like products based on different grades of a chemical or mineral product.[20] Moreover, aspirin crystal and aspirin starch both ultimately are used to produce dosage forms of aspirin or other medicaments which use aspirin as an input.[21] Aspirin processors may purchase aspirin starch compounds to avoid the additional step of blending bulk aspirin and starch during their production process. The processors who purchase aspirin starch can purchase pure aspirin and blend it with starch themselves, provided they have the manufacturing equipment needed to complete this production step.[22] As a result, we find that there are no clear dividing lines between these products and find that the domestic like product includes all forms of bulk aspirin within the scope of this investigation.

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[13] C.R. at I-2-3, P.R. at I-2.

[14] C.R. at I-3, P.R. at I-2.

[15] C.R. at I-2, P.R. at I-2.

[16] C.R. at I-3, P.R. at I-2.

[17] Petition Requesting the Imposition of Antidumping Duties on Imports of Bulk Aspirin From the People's Republic of China at 26.

[18] Respondent A&S submitted a brief which contained identical information to that contained in the brief of Dastech Corporation and Jilin Pharmaceutical, Co. Therefore, this determination does not refer specifically to the brief of A&S.

[19] Post-Conference Brief Submitted on Behalf of Dastech Corporation and Jilin Pharmaceutical Co. ("Resp. Postconf. Br.") at 1. Respondents confuse the scope of the investigation with the definition of the like product. Our analysis, in contrast to Respondents' arguments, focuses on the characteristics of domestically produced bulk aspirin. The use of the term "domestic" in the statutory term "domestic like product" plainly indicates that such a product is one produced in the United States. See also Rollerchain from Japan, Inv. No. 1921-AA-111; Torrington, 747 F. Supp. at 749 (in making a like product determination, the Commission is determining whether differences exist "among the domestic products, not between the domestic products and imported products").

[20] See, e.g., Glycene from the People's Republic of China, Inv. No. 731-TA-718 (Preliminary), USITC Pub. 2804 at I-6 (August 1994); Silicon Carbide from the People's Republic of China, Inv. No. 731-TA-651 (Final), USITC Pub. 2779 at I-9 (June 1994); Saccharin from China and Korea, Inv. Nos. 731-TA-675-676 (Preliminary), USITC Pub. 2716 at I-6-7 & n.20 (Jan. 1994); Sebacic Acid from the People's Republic of China, Inv. No. 731-TA-563 (Preliminary), USITC Pub. 2676 at 8 & n.18 (Sept. 1993).

[21] C.R. I-8-9, P.R. at I-7.

[22] C.R. at I-9, P.R. at I-7.

D. Domestic Industry

The domestic industry is defined as "the producers as a [w]hole of a domestic like product . . . ."[23] In defining the domestic industry, the Commission's general practice has been to include in the industry all of the domestic production of the like product, whether toll-produced, captively consumed, or sold in the domestic merchant market.[24] Based on our finding that the domestic like product consists of all bulk aspirin, we find that the domestic industry currently consists of the sole domestic producer of bulk aspirin, Rhodia, Inc.[25]

III. CONDITIONS OF COMPETITION

The following conditions of competition are pertinent to our analysis in these investigations. As an input, the demand for bulk aspirin is derived from the demand for any finished tablet containing aspirin.[26] Additionally, aspirin competes with acetaminophen and ibuprofen in the finished analgesics market.[27] Chemically, however, there are no direct substitute products for bulk aspirin.[28] Aspirin accounted for roughly 23.4 percent of the analgesics market in 1998. The demand for aspirin has grown modestly in recent years, largely because of aspirin's use as a preventative measure against second heart attacks.[29]

Over the last decade, the domestic industry producing bulk aspirin went through two major consolidations. Prior to 1989, four firms comprised the domestic industry: Dow Chemical Company ("Dow"), Monsanto Chemical Company ("Monsanto"), Norwich-Eaton, and Sterling Drug. In 1989, Rhone-Poulenc S.A., the French multinational corporation, acquired the analgesics business of Monsanto, including Monsanto's bulk aspirin manufacturing facility in St. Louis, Missouri. In 1994, Bayer Corp. acquired Sterling Drug and closed that company's bulk aspirin production operations. In the following year, Norwich-Eaton ceased production of bulk aspirin and began to source its aspirin requirements from Rhone-Poulenc. In late 1995, Rhone-Poulenc entered into an agreement to acquire certain assets of Dow's salicylates businesses, including *** These structural changes culminated in an industry that was reduced from four to two producers at the start of 1996 and to only one after 1996. Rhodia, Inc. was formed in 1997 following a reorganization by Rhone-Poulenc. Rhodia's direct parent is Rhodia S.A., a French firm owned and controlled by Rhone-Poulenc.[30]

All bulk aspirin sold in the United States must meet certain minimum standards. Aspirin must meet the specifications defined in the official monograph of United States Pharmacopoeia (USP) 23 and the Food and Drug Administration must qualify all bulk aspirin products.[31] A question exists about the length of time that it takes to qualify a bulk aspirin product. The parties assert that the qualification period may

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[23] 19 U.S.C. § 1677(4)(A).

[24] See United States Steel Group v. United States, 873 F. Supp. 673, 681-684 (Ct. Int'l Trade 1994), aff'd, 96 F. 3d 1352 (Fed. Cir. 1996).

[25] C.R. at III-1, P.R. at III-1. Our data include production by Dow Chemical Company ("Dow"), a former domestic producer of bulk aspirin in the early period of this investigation. Rhodia's parent company purchased Dow's aspirin business in 1995. Thereafter, *** C.R. at III-1 and III-1 n.1, P.R. at III-1 and III-1 n.1, C.R. & P.R. at Table III-1.

[26] C.R. at II-5, P.R. at II-3.

[27] C.R. at I-9, II-5, P.R. at I-7, II-3 .

[28] C.R. at II-6, P.R. at II-4.

[29] C.R. at II-6, P.R. at II-3.

[30] C.R. at III-1-2, P.R. at III-1. Affiliated firms that also produce bulk aspirin include Rhodia Thai Industries Ltd. (Bangpoo, Thailand) and Rhodia Chemie (St. Fons, France). C.R. at III-2 n.2, P.R. at III-1 n.2.

[31] C.R. at I-7, P.R. at I-6.

be as short as three months or as long as two years.[32] Even assuming that Chinese bulk aspirin meets these minimum requirements, the parties also disagree about whether further quality differences limit the subject imports' interchangeability with domestic bulk aspirin.[33] We intend to explore these two issues further in the final phase of the investigation.

Bulk aspirin may be purchased in different forms: pure aspirin crystals, typically available in 20, 40, 80, or 20/60 mesh sizes; granular 100 percent aspirin; and pure aspirin mixed with starch, usually a blend of 90 percent aspirin and 10 percent starch.[34] ***[35] One of the two Chinese producers who provided data, *** is unable to sift both its pure crystal aspirin and aspirin starch by size due to technological limitations.[36]

Aspirin processors can either purchase the pre-mixed aspirin starch or, if they have the appropriate equipment, they can purchase pure aspirin and blend their own starch mixture.[37] Aspirin starch is generally priced higher than pure aspirin.[38] There may be some incentive to use imported, subject aspirin starch over subject pure aspirin because aspirin starch may enter the U.S. duty free under HTS heading 3003, whereas 100 percent aspirin has an 8.4 percent duty.[39]

The different size of the crystals in the Chinese aspirin starch compound apparently has made it difficult for some domestic processors to use the Chinese product. For example, one domestic processor reported that the Chinese product frequently caused the tableting machine to stop because the particles in the mix were too big.[40] In addition, *** cannot produce aspirin starch with the same precise proportions of aspirin and starch as ***[41]

Finally, the volume of imports from nonsubject countries was large and grew steadily over the period of investigation. In 1996, nonsubject countries shipped 1.1 million pounds of bulk aspirin to the United States, and this volume increased to 2.1 million pounds in 1997 and 2.8 million in 1998. Nonsubject imports' market share also grew from *** percent in 1996 to *** percent in 1998.[42] These imports include nonsubject merchandise from Rhodia's affiliated firm in Thailand.[43]

IV. REASONABLE INDICATION OF THREAT OF MATERIAL INJURY BY REASON OF ALLEGEDLY SUBSIDIZED AND/OR LTFV IMPORTS

Section 771(7)(F) of the Act directs the Commission to determine whether the U.S. industry is threatened with material injury by reason of the subject imports by analyzing whether "further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an

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[32] C.R. at II-7 n.23, P.R. at II-4 n.23.

[33] C.R. at I-7-8, P.R. at I-6. In addition to FDA certification, tableters apparently must "approve" their sources for bulk aspirin in order to ensure the consistent quality of their products and the smooth functioning of their machinery. See C.R. at V-15-18, P.R. at V-5.

[34] C.R. at I-9, P.R. at I-7.

[35] C.R. at I-8, P.R. at I-7.

[36] C.R. at II-4, P.R. at II-3. *** We intend to explore the capability of Chinese producers to sift bulk aspirin according to size in the final phase of the investigation.

[37] C.R. I-9, P.R. at I-7.

[38] C.R. at I-9, P.R. at I-7.

[39] C.R. at I-9, P.R. at I-7.

[40] C.R. at II-4, P.R. at II-3.

[41] C.R. at II-8, P.R. at II-5. *** aspirin starch compound is exactly 90 percent aspirin and 10 percent starch; *** even sells two products that contain 10.7 percent starch. *** is not able to match *** consistency. Id.

[42] C.R. & P.R. at Tables IV-2 & IV-3.

[43] C.R. at IV-2 n.3, P.R. at IV-1 n.3.

order is issued or a suspension agreement is accepted."[44] The Commission may not make such a determination "on the basis of mere conjecture or supposition,"[45] and considers the threat factors "as a whole." In making our determination, we have considered all factors that are relevant to these investigations.[46] [47] [48] Based on an evaluation of the relevant statutory factors, for the reasons described below, we find a reasonable indication that the domestic industry is threatened with material injury by reason of subject imports from China.

As part of our threat of material injury analysis, we have taken into account the current state of the domestic industry.[49] The domestic industry has reported substantial *** in 1998, which the domestic producer claims are a result of the decrease in sales volumes.[50] We note, however, that Rhodia's losses may reflect a significant increase in the ***[51] In interim 1999, sales volumes and profitability were increasing once again.[52] Rhodia argues that this upturn in 1999 was an anomaly resulting from a build-up of inventory by some of its customers.[53] We will explore these issues further in the final phase of the investigation.

There was a significant rate of increase of the volume and market penetration of Chinese bulk aspirin, indicating the likelihood of substantially increased imports.[54] The quantity and value of imports from China increased significantly over the entire period of investigation, with the largest increase occurring in the most recent period, from 1997 to 1998.[55] The volume of imports from China resulted in an increase in the market share of these imports, while the market share of the domestic industry declined

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[44] 19 U.S.C. §§ 1673b(a) and 1677(7)(F)(ii).

[45] 19 U.S.C. §1677(7)(F)(ii). An affirmative threat determination must be based upon "positive evidence tending to show an intention to increase the levels of importation." Metallverken Nederland B.V. v. United States, 744 F. Supp. 281, 287 (Ct. Int'l Trade 1990), citing American Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1280 (Ct. Int'l Trade 1984). See also Calabrian Corp. v. United States, 794 F. Supp. 377, 387-88 (Ct. Int'l Trade 1992), citing H.R. Rep. No. 1156, 98th Cong., 2d Sess. 174 (1984).

[46] 19 U.S.C. § 1677(7)(F)(i). Factors I and VII are inapplicable since these investigations do not involve a countervailable subsidy or the importation of agricultural products. See 19 U.S.C. § 1677(7)(F)(iii)(I).

[47] In its notice of initiation, Commerce stated that the estimated dumping margin ranged from 8.28 to 144.02 percent.

[48] Chairman Bragg notes that she does not ordinarily consider the alleged margin of dumping to be of particular significance in evaluating the effects of subject imports on domestic producers. See Separate and Dissenting Views of Commissioner Lynn M. Bragg in Bicycles from China, Inv. No. 731-TA-731 (Final), USITC Pub. 2968 (June 1996).

[49] Suramerica de Aleaciones Laminadas, C.A. v. United States, 44 F.3d 978 (Fed. Cir. 1994).

[50] Postconference Brief on Behalf of Rhodia, Inc. ("Pet. Postconf. Br.") at 32. We note that some decrease in sales volume likely resulted from Rhodia's cessation of shipments of factory "seconds." C.R. at V-15-16, P.R. at V-5. Rhodia curtailed production in 1998 to *** which may have drawn imports into the market in greater quantities to meet unfilled demand. C.R. at VI-2, P.R. at VI-1. We intend to explore this issue further the final phase of the investigation.

[51] C.R. at VI-2, P.R. at VI-1. SG&A expenses increased nearly 400 percent from 1996 to 1998.

[52] C.R. & P.R. at Table III-2.

[53] Pet. Postconf. Br. at 34.

[54] §771(7)(F)(i)(III) of the Act, 19 U.S.C. § 1677(F)(i)(III)

[55] C.R. & P.R. at Table IV-2. Imports from China were *** million pounds in 1996, *** million pounds in 1997, *** million pounds in 1998, *** pounds in interim 1998, and *** million pounds in interim 1999. The volume of imports from China increased by *** percent from 1996 to 1997 and then increased another *** percent in 1998. Over the interim period, the volume of imports from China also increased *** percent. Imports from China were valued at *** million in 1996, *** million in 1997, *** million in 1998, *** million in interim 1998, and *** million in interim 1999. Domestic shipments were valued at *** million in 1996, *** million in 1997, *** million in 1998, *** million in interim 1998, and *** million in interim 1999. C.R. & P.R. at Table IV-2.

significantly,[56] particularly in the period between 1997 and 1998.[57] The extent to which the increased subject imports represent business taken from the domestic industry by the subject imports is unclear, however, because the record indicates that quality differences may significantly limit the degree of competition between Chinese and U.S. bulk aspirin.[58] We intend to explore this issue in the final phase of the investigation.

A significant percentage of Chinese production is exported, and, between 1997 and 1998, Chinese producers decreased the share of their shipments sold in the domestic Chinese market or sent to other export markets while increasing shipments sent to the United States.[59] This correlation seems to indicate that Chinese producers increasingly are focusing their sales efforts on exports to the United States market. Petitioner alleges that Chinese exports to the United States will increase once U.S. processors qualify the Chinese product, thus presenting the U.S. producer with the prospect of further declining shipments and reduced market share. Indeed, some domestic processors, including Rhodia's largest customer, are in the process of approving the Chinese subject merchandise.[60] While it is unclear when the qualification process will be completed, these efforts provide support for our finding that further subject imports are likely.

The record shows a high capacity utilization rate for Chinese producers, and an increase in this utilization rate over the period of investigation.[61] However, we have received data on capacity from only two of the three largest producers in China.[62] Moreover, the total production reported by the two producers exceeds the total capacity reported. We therefore intend to gather more information and explore this issue further in the final phase of the investigation.

The limited data provided by Chinese producers show low levels of inventories of the subject

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[56] C.R. & P.R. at Table IV-3. Chinese market share based on quantity was *** percent in 1996, *** percent in 1997, *** percent in 1998, *** percent in interim 1998, and *** percent in interim 1999. The domestic share based on quantity was *** percent in 1996, *** percent in 1997, *** percent in 1998, *** percent in interim 1998, and *** percent in interim 1999. The share of apparent consumption based on value for the Chinese product was *** percent in 1996, *** percent in 1997, *** percent in 1998, *** percent in interim 1998, *** percent in interim 1999. The share of apparent consumption based on value for the domestic product was *** percent in 1996, *** percent in 1997, *** percent in 1998, *** percent in interim 1998, *** in interim 1999. C.R. & P.R. Table IV-3.

[57] The domestic producers lost *** percent of their market share between 1997 and 1998; market share of subject imports increased *** percent during that period, while nonsubject imports' market share increased *** percent. C.R. & P.R. at Table C-1.

[58] Producer and importer questionnaires identified few common tableter customers for domestic and Chinese aspirin. See also Resp. Postconf. Br. at 3-8, Ex. 5 (ACS Affidavit) (Chinese aspirin servicing the growing low-price generic market abandoned by domestic producers).

[59] C.R. & P.R. at Table VII-1. Chinese exports to the United States were *** percent of total shipments in 1996, *** percent in 1997, *** percent in 1998, *** percent in interim 1998, and *** percent in interim 1999. Chinese home market sales were *** percent of shipments in 1996, *** percent in 1997, *** percent in 1998, *** percent in interim 1998, and *** percent in interim 1999. Chinese exports to other markets were *** percent of total shipments in 1996, *** percent in 1997, *** percent in 1998, *** percent in interim 1998, and *** percent in interim 1999. C.R. & P.R. at Table VII-1.

[60] C.R. at V-15-18, P.R. at V-5. Aspirin must be qualified by the FDA in order to be sold in the U.S. market and must also meet standards set by each processor. It is unclear from the record whether what is preventing further imports is the time needed to obtain FDA approval or individual processor approval. In addition, Rhodia alleges that qualification is a relatively simple process that takes only several months, while the Chinese Respondents argue that the process takes two years. See Pet. Postconf. Br. at 43; Resp. Postconf. Br. at 14. We intend to gather more information on the alleged future qualifications and will explore this issue further in the final phase of the investigation.

[61] C.R. & P.R. at Table VII-1. We note the steady increase in reported Chinese capacity during the period of investigation, as well as Petitioner's allegations that total capacity is substantially higher than reported.

[62] C.R. at VII-1 n.1, P.R. at VII-1 n.1.

merchandise, and that the ratio of inventories to production fluctuated at low levels over the period of investigation.[63] In addition, the inventories of U.S. importers of the subject merchandise were quite low during this same period of investigation.[64] These inventories have risen consistently over the period of investigation, however.

In considering whether the subject imports are likely to depress or suppress domestic prices to a significant degree, we note that subject imports undersold the domestic product in every comparison over the period examined. In addition, Chinese prices for each product fell over the period of investigation.[65] However, domestic prices showed no clear trend over the period of investigation, and the average unit value of shipments of the domestic product did not decrease over the period of investigation.[66] The apparent underselling instead may reflect quality and substitutability issues that we intend to examine further in the final phase of the investigation. As discussed above, U.S. processors have begun the procedures for qualifying the Chinese product in the United States for use in their aspirin tableting operations. The subject merchandise is likely to have more prevalent price effects once U.S. processors succeed in their efforts to qualify the Chinese product.

We have also examined the statutory criterion concerning the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.[67] Rhodia alleges that the negative trends in profitability have caused it to ***[68]

Finally, we are unaware of any other demonstrable adverse trends suggesting that the subject imports will imminently materially injure the industry.[69]

CONCLUSION

For the reasons stated above, we find a reasonable indication that the domestic industry producing bulk aspirin is threatened with material injury by reason of subject imports from China.

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[63] C.R. at VII-4, P.R. at VII-2.

[64] C.R. & P.R. at Table VII-2.

[65] C.R. & P.R. at Tables V-I, V-2, V-3. The margins of underselling over all products ranged from *** percent to *** percent. C.R. at V-10, P.R. at V-4.

[66] C.R. at III-6, V-9, P.R. at III-3, V-4. The average unit value of Dow's and Rhodia's combined domestic sales fell by *** per pound between 1996 and 1997 and then increased by *** per pound in 1998. The average unit value of Rhodia's product alone, however, increased by *** per pound over the period. It then decreased by *** from interim 1998 to interim 1999. C.R. at III-6, P.R. at III-3.

[67] 19 U.S.C. § 1677(7)(F)(i)(IX).

[68] Pet. Postconf. Br. at 38.

[69] 19 U.S.C. § 1677(7)(F)(i)(IX).

VIEWS OF COMMISSIONER CAROL T. CRAWFORD

On the basis of information obtained in these preliminary investigations, I determine that there is a reasonable indication that the industry in the United States producing bulk aspirin is materially injured by reason of imports of bulk aspirin from China that allegedly are sold in the United States at less-than-fair-value ("LTFV"). I join my colleagues in their discussion of the appropriate legal standard for preliminary investigations and with their findings concerning the like product and domestic industry. I also join the majority in their discussion of the conditions of competition that are distinctive to the domestic industry. However, I do not concur in the majority's determination that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of the subject imports. Rather, I determine that there is a reasonable indication that the industry in the United States producing bulk aspirin is materially injured by reason of the allegedly LTFV imports of bulk aspirin from China. Because my analysis and determination differ from the majority, my separate views follow.

I. ANALYTICAL FRAMEWORK

In determining whether there is a reasonable indication that a domestic industry is materially injured by reason of the allegedly LTFV imports, the statute directs the Commission to consider:

(I) the volume of imports of the merchandise which is the subject of the investigation,
(II) the effect of imports of that merchandise on prices in the United States for like products, and
(III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States…[1]

In making its determination, the Commission may consider "such other economic factors as are relevant to the determination."[2] In addition, the Commission "shall evaluate all relevant economic factors which have a bearing on the state of the industry … within the context of the business cycle and conditions of competition that are distinctive to the affected industry."[3]

The statute directs that we determine whether a domestic industry is materially injured "by reason of" the unfairly traded imports. Thus we are called upon to evaluate the effect of dumped imports on the domestic industry and determine if they are causing material injury. There may be, and often are, other "factors" that are causing injury. These factors may even be causing greater injury than the dumping. However, the statute does not require us to weigh or prioritize the factors that independently are causing material injury. Rather, the Commission is to determine whether any injury "by reason of" the unfairly traded imports is material. That is, the Commission must determine if the subject imports are causing material injury to the domestic industry. "When determining the effects of imports on the domestic industry, the Commission must consider all relevant factors that can demonstrate if unfairly traded imports are materially injuring the domestic industry."[4] It is important, therefore, to assess the effects of the unfairly traded imports in a way that distinguishes those effects from the effects of other factors unrelated to and dumping. To do this, I compare the current condition of the industry to the industry conditions that would have existed without dumping, that

[1] 19 U.S.C. § 1677(7)(B)(I).
[2] 19 U.S.C.§ 1677(7)(B)(ii).
[3] 19 U.S.C. § 1677(7)(C)(iii).
[4] S. Rep. No. 100-71 at 116 (1987)(emphasis added); Gerald Metals, Inc. v. United States, 132 F.3d 716 (Fed. Cir. 1997)(rehearing denied).

is, had subject imports all been fairly priced. I then determine whether the change in conditions constitutes material injury.[5]

In my analysis of material injury, I evaluate the effects of dumping[6] on domestic prices, domestic sales, and domestic revenues. To evaluate the effects of dumping on domestic prices, I compare domestic prices that existed when the imports were dumped with what domestic prices would have been if the imports had been priced fairly. Similarly, to evaluate the effects of dumping on the quantity of domestic sales,[7] I compare the level of domestic sales that existed when imports were dumped with what domestic sales would have been if the imports had been priced fairly. The combined price and quantity effects translate into an overall domestic revenue impact. Understanding the impact on the domestic industry's prices, sales, and overall revenues is critical to determining the state of the industry, because the effects on the statutory impact factors[8] (*e.g.*, employment, wages, *etc*.) are derived from the impact on the domestic industry's prices, sales, and revenues.

I then determine whether the price, sales, and revenue effects of dumping, either separately or together, demonstrate that the domestic industry would have been materially better off if the imports had been priced fairly. If so, the domestic industry is materially injured by reason of the dumped imports.

For the reasons discussed below, I determine that there is a reasonable indication that the domestic industry producing bulk aspirin is materially injured by reason of allegedly LTFV imports of bulk aspirin from China.

II. CONDITIONS OF COMPETITION

To understand how an industry is affected by unfair imports, we must examine the conditions of competition in the domestic market. The conditions of competition constitute the commercial environment in which the domestic industry competes with unfair imports, and thus form the foundation for a realistic assessment of the effects of dumping. This environment includes demand conditions, substitutability among and between products from different sources, and supply conditions in the market.

A. Demand Conditions

An analysis of demand conditions tells us what options are available to purchasers, and how they are likely to respond to changes in market conditions, for example, an increase in the general level of prices in the market. Purchasers generally seek to avoid price increases, but their ability to do so varies with conditions in the market. The willingness of purchasers to pay a higher price will depend on the importance of the product to them (*e.g.*, how large a cost factor), whether they have options that allow them to avoid the price increase, for example by switching to alternative products, or whether they can exercise buying power to negotiate a lower price. An analysis of these demand-side factors tells us whether demand for the product is elastic or

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[5] Both the Court of International Trade and the United States Court of Appeals for the Federal Circuit have held that the "statutory language fits very well" with my mode of analysis, expressly holding that my mode of analysis comports with the statutory requirements for reaching a determination of material injury by reason of the subject imports. United States Steel Group v. United States, 96 F.3d 1352, at 1361 (Fed.Cir. 1996), *aff'g* 873 F.Supp. 673, 694-695 (Ct. Int'l Trade 1994).

[6] As part of its consideration of the impact of imports, the statute as amended by the URAA now specifies that the Commission is to consider in an antidumping proceeding, "the magnitude of the margin of dumping." 19 U.S.C. § 1677(7)(C)(iii)(V).

[7] In examining the quantity sold, I take into account sales from both existing inventory and new production.

[8] 19 U.S.C. § 1677(7)(C)(iii).

inelastic, that is, whether purchasers will reduce the quantity of their purchases if the price of the product increases. For the reasons discussed below, I find that the overall elasticity of demand for bulk aspirin is relatively high. Therefore, purchasers are likely to reduce their purchases if prices for these products increase.

Importance of the Product and Cost Factor. Key factors that measure the willingness of purchasers to pay higher prices are the importance of the product to purchasers and the significance of its cost. Record evidence in this investigation shows that the cost share of bulk aspirin accounts for a relatively high percentage of the downstream products in which it is used.[9] This high cost share is evidence of a fairly high elasticity of demand.

Alternative Products. Another important factor in determining whether purchasers would be willing to pay higher prices is the availability of viable alternative products. Often purchasers can avoid a price increase by switching to alternative products. If such an option exists, it can impose discipline on producer efforts to increase prices.

Information on the record indicates that only limited alternative products are available that can substitute for bulk aspirin.[10] There may be some limited substitution between aspirin and alternative products such as ibuprofen and acetaminophen. Each are analgesic products designed for mild pain relief. Yet, each of these products is also utilized for other distinctive properties. For example, aspirin is known to be an effective treatment for certain stress and cardiovascular related problems, ibuprofen is more effective with arthritic pain, and acetaminophen is touted as an effective fever reducer. Thus, while there reportedly are limited substitute products for bulk aspirin, those products that can be substituted generally serve different markets and may cost two to five times more than bulk aspirin. The limited availability of alternative products is evidence of a relatively lower elasticity of demand.

Overall, based on the high cost share of bulk aspirin in the final downstream products in which they are used coupled with the mitigating effects of the limited availability of substitutable alternative products, I find that the elasticity of demand for bulk aspirin is moderately high. That is, purchasers likely will reduce significantly the amount of bulk aspirin they buy in response to a general increase in prices for these products.

B. Substitutability

Simply put, substitutability measures the similarity or dissimilarity of imported versus domestic products from the purchaser's perspective. Substitutability depends upon 1) the extent of product differentiation, measured by product attributes such as physical characteristics, suitability for intended use, design, convenience or difficulty of usage, quality, *etc*.; 2) differences in other nonprice considerations such as reliability of delivery, technical support, and lead times; and 3) differences in terms and conditions of sale. Products are close substitutes and have high substitutability if product attributes, other nonprice considerations, and terms and conditions of sale are similar.

While price is nearly always important in purchasing decisions, nonprice factors that differentiate products determine the value that purchasers receive for the price they pay. If products are close substitutes, their value to purchasers is similar, and thus purchasers will respond more readily to relative price changes. On the other hand, if products are not close substitutes, relative price changes are less important and are therefore less likely to induce purchasers to switch from one source to another.

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[9] The cost share of bulk aspirin in downstream production varies significantly fluctuating between *** percent of the direct cost of aspirin tablet production. CR at II-6; PR at II-4.

[10] CR at I-9; PR at I-7.

Because demand elasticity for bulk aspirin is moderately high, overall purchases will decline significantly if the overall prices of bulk aspirin increase. However, purchasers can avoid price increases from one source by seeking other sources of bulk aspirin. In addition to any changes in overall demand for bulk aspirin, the demand for bulk aspirin from different sources will decrease or increase depending on their relative prices and their substitutability. If bulk aspirin from different sources are substitutable, purchasers are more likely to shift their demand when the price from one source (*i.e.*, subject imports) increases. The magnitude of this shift in demand is determined by the degree of substitutability among the sources.

Purchasers have three potential sources of bulk aspirin: the domestic product, subject imports, and nonsubject imports. Purchasers are more or less likely to switch from one source to another depending on the similarity, or substitutability, between and among them. For purposes of this preliminary investigation, I find that the available evidence indicates that there is a moderate level of substitutability between and among subject imports, nonsubject imports and the domestic like product

In general terms, all three sources of bulk aspirin must meet certain basic pharmacological requirements. However, the level of substitutability between and among these sources is reduced somewhat by certain nonprice factors such as quality and the conditions of sale. For example, certain evidence shows that domestic and subject merchandise are not interchangeable primarily due to the perceptions of lower quality of Chinese bulk aspirin. Moreover, unlike the domestic product, the record shows that at least one subject producer is unable to sift its bulk aspirin by particular mesh size. This fact has reportedly made it difficult for some processors (tableters) to handle the Chinese material in their production processes. Thus, some processors have described strict preferences for a particular mesh size because their machines have been calibrated to run under precise specifications. Yet, the available evidence also indicates that processors can recalibrate their equipment to run with different mesh sizes without much difficulty.[11]

Further available evidence also suggests that there is a moderate substitutability between and among domestic, subject and nonsubject merchandise. In fact, the petitioner states that ***.[12] In general terms, a processor receives FDA approval for a product with a particular specification. Such processor then seeks suppliers that can produce bulk aspirin that meet those specifications. However, if a supplier can offer a low enough price, a processor can adjust its formulation and processing equipment to utilize the less expensive bulk aspirin.[13]

Based on the available record, I find that there is a moderate level of substitutability between and among domestic, subject and nonsubject merchandise. However, I intend to explore this issue further in any final phase of the investigation.

C. Supply Conditions

Supply conditions in the market are a third condition of competition. Supply conditions determine how producers would respond to an increase in demand for their product, and also affect whether producers are able to institute price increases and make them stick. Supply conditions include producers' capacity utilization, their ability to increase their capacity readily, the availability of inventories and products for export markets, production alternatives and the level of competition in the market. For the reasons discussed below, I find that the elasticity of supply of bulk aspirin appears to be relatively high.

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[11] CR at II-4; PR at II-3.

[12] CR at II-9; PR at II-5.

[13] CR at II-4; PR at II-2. Hearing Transcript at 50-51.

Capacity Utilization and Capacity. Unused capacity can exercise discipline on prices. If there is a competitive market, no individual producer can make a price increase stick. Any attempt at a price increase by one producer would be beaten back by competitors who could produce more product to sell at the prevailing price. Here, the domestic industry operated at rather moderate levels of capacity utilization throughout the period of investigation. In 1998, Rhodia's capacity utilization, and thus the domestic industry's capacity utilization, was *** percent. In absolute terms, the domestic industry had unused capacity of *** pounds in 1998. Thus, in 1998 *** percent of the domestic industry's capacity to produce bulk aspirin was not used and therefore was available to increase production.[14] Consequently, the domestic industry has *** capacity available to supply the demand for subject imports.

Inventories and Exports. In 1998, the domestic industry's inventories of *** pounds accounted for *** percent of its shipments, while its exports of *** pounds accounted for *** percent of shipments.[15] Thus, the domestic industry's available inventories and export shipments represented a significant source of supply that could have been used to fill the demand supplied by subject imports.

Level of Competition. The level of competition in the domestic market has a critical effect on producer responses to demand increases. A competitive market is one with a number of suppliers in which no one producer has the power to influence price significantly. In the U.S. market, there is only one domestic producer of bulk aspirin. However, nonsubject imports are a substantial source of competition in this market, accounting for *** percent of consumption in 1998.[16] Even though there is only one domestic producer of bulk aspirin, competition from nonsubject imports indicates that there is a significant level of competition overall in the U.S. market.

Given the level of competition in the U.S. market and the domestic industry's apparent ability to supply the demand for subject imports, I find that the elasticity of supply is relatively high.

III. REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF ALLEGEDLY LTFV IMPORTS OF BULK ASPIRIN FROM CHINA

The statute requires us to consider the volume of subject imports, their effect on domestic prices, and their impact on the domestic industry. I consider each requirement in turn.

A. Volume of Subject Imports

Subject imports from China increased from *** pounds in 1996 to *** pounds in 1997, and to *** pounds in 1998. The value of subject imports from China was $*** in 1996, $*** in 1997, and $*** in 1998.[17] By quantity, the subject imports held a market share of *** percent in 1996, *** percent in 1997, and *** percent in 1998. Their market share by value was *** percent in 1996, *** percent in 1997, and *** percent in 1998.[18] While it is clear that the larger the volume of subject imports, the larger the effect they will have on the domestic industry, whether the volume is significant cannot be determined in a vacuum, but must be evaluated in the context of its price and volume effects. Based on the market share of subject imports and the conditions of competition in the domestic market, I find that the volume of subject imports is significant in light of its price and volume effects.

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[14] CR and PR at Table III-1.
[15] CR and PR at Table III-4.
[16] CR and PR at Table IV-3.
[17] CR and PR at Table IV-1.
[18] CR and PR at Table IV-3.

B. Effect of Subject Imports on Domestic Prices

I find that subject imports are not having significant effects on domestic prices for bulk aspirin. To determine the effect of the subject imports on domestic prices, I examine whether the domestic industry could have increased its prices if the subject imports had not been dumped. As discussed, both demand and supply conditions in the domestic market are relevant. Examining demand conditions helps us understand whether purchasers would have been willing to pay higher prices for the domestic product, or buy less of it, if subject imports had been sold at fairly traded prices. Examining supply conditions helps us understand whether available capacity and competition among suppliers to the market would have imposed discipline and prevented price increases for the domestic product, even if subject imports had not been unfairly priced.

If the subject imports had not been dumped, their prices in the U.S. market would have increased significantly. Thus, if subject imports had been fairly priced, they would have become more expensive relative to domestic bulk aspirin. In such a case, if subject imports are good substitutes with other bulk aspirin, purchasers would have shifted towards the relatively less expensive products.

In this investigation, the alleged dumping margins for the subject imports generally are quite large, ranging from 8.28 to 144.02 percent.[19] Therefore, subject imports likely would have been priced significantly higher had they been fairly traded. At the higher, fairly traded prices a substantial portion of the demand supplied by subject imports from China likely would have shifted away from this source and toward other sources of supply. Moreover, it is likely that most of this shift in demand away from subject imports would have been captured by both the domestic industry and nonsubject imports because they are moderate substitutes for each other. Thus, it is likely that demand for both the domestic product and nonsubject imports would have increased.

Since subject imports from China held a market share of *** percent by quantity in 1998, the shift in demand away from the subject imports likely would have been fairly large. By quantity, nonsubject imports accounted for *** percent of the market in 1998, and thus represent significant competition for the domestic industry, which accounted for *** percent of the market in 1998. Since subject imports from China and domestic bulk aspirin are moderate substitutes for each other, a significant portion of the demand for subject imports likely would have shifted to the domestic product.

The elasticity of demand indicates the sole domestic supplier should have been able to increase prices in response to this shift in demand. However, any attempt by the domestic industry to increase its prices in response to the shift in demand would have been unsuccessful. There is significant competition from nonsubject imports, and the domestic industry has substantial unused production capacity available, as well as some inventory and export supply, with which it would have competed for sales, had demand shifted away from the subject imports. This competition would have enforced price discipline in the market. In these circumstances, any effort by the domestic producer to raise its prices would have been beaten back by the competition. Therefore, significant effects on domestic prices cannot be attributed to the unfair pricing of these subject imports. Consequently, I find that the subject imports are not having significant effects on prices for domestic bulk aspirin.

C. Impact of Subject Imports on the Domestic Industry

[19] 64 Fed. Reg. 33463, 33464 (June 23, 1999).

To assess the impact of subject imports on the domestic industry, I consider output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, research and development and other relevant factors.[20] These factors together either encompass or reflect the volume and price effects of the dumped imports, and so I gauge the impact of dumping through those effects.

The domestic industry would not have been able to increase its prices significantly if the subject imports had been sold at fairly traded prices. Therefore, any impact of the dumped imports on the domestic industry would have been on the domestic industry's output and sales.

As I have discussed above, competition from nonsubject imports is significant, and thus, had the subject imports not been unfairly traded, only some of the demand satisfied by the subject imports would have shifted to the domestic product. The increase in demand for the domestic product likely would have been significant, and the domestic producer could have increased its production and sales to satisfy the increased demand. The domestic industry likely would have captured enough of the demand for subject imports from China that its output and sales, and therefore its revenues, would have increased significantly had the subject imports not been dumped. Consequently, the domestic industry likely would have been materially better off if the subject imports had been fairly traded.

IV. CONCLUSION

On the basis of the foregoing analysis, I find that the domestic industry would not have increased its prices, but would have increased its output and sales, and therefore its revenues, significantly had the subject imports been fairly traded. Therefore, I find that the domestic industry would have been materially better off if the subject imports had not been dumped. Consequently, I determine that there is a reasonable indication that the domestic industry producing bulk aspirin is materially injured by reason of allegedly LTFV imports of bulk aspirin from China.

[20] 19 U.S.C. § 1677(7)(C)(iii).